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**LEGAL INSTRUMENTS OF WOMAN
EMANCIPATION IN THE MATTER OF DIVORCE
AND SUCCESSION IN THE BYZANTINE PERIOD**

-PhD thesis-

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CONTENTS

I.	INTRODUCTION	16
II.	<i>VARIUM ET MUTABILE SEMPER FEMINA</i>	29
1.	Legal terminology given to Roman feminine characters	29
2.	<i>Patria potestas</i>	34
3.	<i>Manus</i>	37
4.	<i>Tutela mulierum</i>	39
a.	The necessity of guardianship	39
b.	Appointing the guardian	41
c.	Categories of guardians	43
d.	The activity of the guardian	46
e.	The end of the woman's guardianship	47
III.	DOWRY	51
1.	Establishment	53
2.	The status of the dowry during marriage	59
3.	Dowry restitution	63
4.	The evolution of the dowry regime in the Empire	73
5.	<i>Bona extra dotem</i>	82
IV.	DIVORCE-PROOF OF THE ROMAN WOMAN'S EMANCIPATION?	86
1.	Concept and introductory aspects	86
2.	From <i>mores maiorum</i> to the republican libertinism: virtues and vices	90
a.	The <i>cum manu</i> marriage	90
a.1.	Status of the wife and the right of the husband to repudiate her	93
a.2.	Deeds that led to the woman's repudiation	95
a.3.	The <i>cum manu</i> marriage decline. <i>Dissensus</i> -sufficient and real reason for the marriage dissolution?	99
b.	The <i>sine manu</i> marriage	102
b.1	<i>Affectio maritalis</i> -essential condition for the conclusion of the marriage	103
b.2.	Effects of the extinction of formalism in case of divorce	107
3.	The laws of Octavian Augustus, an attempt of revitalizing the old Roman morality	112
a.	Is a certain form necessary in the divorce procedure?	114
a.1.	Legal allusions to formalism	114
a.2.	Texts that do not imply a certain form for the divorce	117
b.	Divorce and adultery	120
b.1.	<i>Lex Iulia de adulteriis coercendis et de pudicitia</i> and <i>Lex Iulia de maritandis ordinibus</i>	120
b.2.	Other legal rules introduced by Augustus related to divorce	129

c.	The liberta and the patron-exception from the woman's right to request divorce	131
4.	The Christian influence on divorce in the Roman Empire	133
a.	The Church canons regarding the family life	136
a.1.	The birth and evolution of Christianity in the Roman Empire	136
a.2.	Canon texts-ecclesial rules regarding marriage	147
b.	Constantine the Great-the first normative acts regarding the divorce based on the Christian doctrine	157
c.	Law in the 4 th -5 th centuries: from Honorius to Valentinian III	162
d.	The reform of Justinian, the <i>uxorios</i> emperor	165
d.1.	Justinian, jurist and theologian	166
d.2.	The influence of Theodora, Justinian's wife	179
d.3.	Rising marriage at <i>sacramentum</i> degree and hardening the conditions in case of divorce	187
5.	Entrusting and protecting descendants in the case of divorcing parents	194
V.	EVOLUTION OF THE LEGAL STATUS OF WOMEN	
	IN THE MATTER OF SUCCESSIONS	198
1.	General notions	198
2.	The situation of the surviving wife in the old Roman law	199
a.	<i>Uxor in manu</i>	199
b.	The <i>sine manu</i> marriage	201
3.	<i>Bonorum possessio unde vir et uxor</i>	202
a.	Required conditions to be an inheritor according to <i>ius honorarum</i>	203
b.	The intervention of the Pretorian law in the <i>cum manu</i> marriage	206
4.	The surviving wife and <i>ius novum</i>	207
a.	Provisions of the classical law	207
b.	The post-classical era. The emergence of Christianity	208
5.	Justinian's laws regarding the surviving husband	210
a.	Novel 53 or the patrimonial status of the destitute husband	211
b.	The reform of Novel 117	215
c.	Does the destitute widow own any right of accretion and succession reserve?	218
6.	Succession relationships between the mother and her offspring	219
a.	The mother's role in her offspring's life	219
b.	The Tertullian senatus consult	221
c.	The Orfitian senatus consult (178)	224
d.	Imperial constitutions of succession laws based on the principle of cognation	226
VI.	CONCLUSIONS	229
	ABBREVIATIONS LIST	236
	BIBLIOGRAPHY	236

Key words: woman, family, *dos*, marriage, divorce, surviving wife, Roman law, Christianity, Justinian.

ABSTRACT

The hereby research, structured in two large parts, predominantly theoretical, the evolution of the Roman woman's status within the divorce and from her position of inheritor, represents, at the same time, a foray in the personal area of the Eternal City matrons. In the attempt of not only putting together certain legal information, thus not turning the PhD thesis into an arid paper, we are trying to present the evolution of the woman in the Roman society from a diverse range of scientific perspectives, blending several aspects of life that can be politically, socially, economically, legally and religiously documented. At the same time, since the emphasis of the paper falls on the Roman-Byzantine period, we have tried to observe whether and under what conditions the Christian dogmas have laid their imprint on the legal segment of the Dominate.

Initially, the framework within which the Roman woman had to live her life was a controlled, limited one, because neither the tradition nor the law allowed her to be heard and noticed beyond the limits of the family space. The role of these women within the families was very important only in terms of raising and educating children, social and emotional climate of the family or the family ethics. Inherited, and then perpetuated for centuries, this inequality proves an uncontested fact that the Roman women have accepted their condition and, for almost a thousand years, have not tried to overturn the logical order of cohabitation, namely the male supremacy. Although the Romans have not been interested in writing about women, they praised modesty, chastity, and fidelity in women, virtues reintroduced by Christianity.

In social language, *varium et mutabile semper femina*, has granted the Roman woman the possibility to claim a certain protection, but at the same time, it exposed her to violence and oppression, especially in her own home. We notice how, at the same time, Roman men disregard the woman because of her natural inferiority, but also appreciate her as a mother or a wife. In this respect, three great forms of authority have been created, to which the woman was subordinated, throughout her life: paternal authority, marital authority and guardianship.

Regarding the *patria potestas*, the authority of the head of household over his descendants has existed from ancient times. Being understood as a privilege, its explanation resides in the importance

held in the society by those who carried weapons, but also the fact that only the father was considered a relative of his offspring, and the mother was not. By the end of the Republic, as the authority of the *pater familias* weakened over its descendants, and respectively over his wife, his image changes. Thus, we no longer speak about that authoritarian and feared head of family, but a caring father towards his children, respecting their personality. Thus, in the time of Justinian, the paternal authority came to diminish its implications in the daily life considerably.

Another means by which Romans understood to provide content to the principle of *femina semper in tutela est* was the institution of guardianship. From a legal point of view, at the father's or husband's death, the widow and the marriageable daughters became *sui iuris*, but for any legal act, it was required to have the permission of a person that was capable in terms of legal competence. Antique authors and Roman jurists motivate the necessity of the permanent guardianship over women, invoking their light-mindedness (*levitas animi*) or their weak judgment (*infirmitas consilii*). The only *sui iuris* women making exception from guardianship were Vestals, due to their privileged condition, and starting from the time of Augustus, the free women who give birth to at least three children the freedwomen having at least four children. Somehow simultaneously with the decadence of the *cum manu* marriage, the agnatic guardianship on women was abolished around the 1st century through *Lex Claudia de tutela mulierum*, under the reign of Emperor Claudius. The last allusions regarding the guardianship of women are found during the reign of Diocletian, in two constitutions from the year 293 or 294. From a legal point of view, the woman, in the Byzantine Empire, is not under guardianship.

The constructivism specific to the Roman society has neither overlooked the case of a *filia* becoming *coniux*, thus entering the possession of the husband by marriage. Therefore, *ius civile* has known the concept of *manus*, i.e. the authority exercised by the husband over his wife. The girls stopped being under paternal authority through the *cum manu* marriage, and on this occasion they entered the marital authority. This type of matrimonial unions were rarely dissolved by repudiation or divorce, because in the era of the *cum manu* marriages the divorce involved a sacrilege, the woman being integrated in her husband's family as a *filiae loco*; thus, death or in extreme cases, captivity, were the ones leading to the dissolution of the marriage. The laws of Romulus stipulated the punishment of the married woman, by repudiation, following the verdict of the family members, for the following deeds: poisoning, keys theft, adultery, abortion. It is the period when the austerity of the morals ensures that the marriage gets a prestige that it never encountered again later.

Following the Punic Wars and especially in the Empire, as the slavery exploitation deepened, an inflow of richness was brought by Rome from the provinces and the opulence of the rich classes of the society increased, social contradictions and moral decadence became more and more perceptible in the dominant classes. Relationships within families became fragile, opposed to the Roman virtues from the old era, and as the *sine manu* marriage occurred, divorces become more and more usual in these classes. Looking from a historical angle, this is the starting point for the social and legal emancipation women. If, until then, women were not allowed to divorce their husbands, the last century of the Republic has brought about a great number of such initiatives. Despite all reluctance encountered, the corpus of laws promulgated by Octavian Augustus (1st century B.C. - 1st century A.D.), *Lex Iulia de adulteriis*, *Lex Iulia de maritandis ordinibus*, *Lex Iulia de fundo dotali* and *Lex Papia Poppaea*, represent an important progress, compared to the old laws. By forbidding the husband to make his own justice, most of the times in a cruel manner and by admitting the joint fault in case of adultery, both authors of the deed were considered guilty. By exiling the adulterers, confiscating half of their possessions and forbidding to perpetuity their marriage with the coauthor of their crime, the emperor has marked an incontestable progress in the matter of divorce, as compared to his predecessors. Lapsing rapidly, the initiatives of the first Roman Emperor bind, at least at the level of political elites, in a much more consistent manner than before, a family's existence to its perpetuation. In the following centuries, the emperors often intervened in an attempt to hinder separations without a serious reason, but the results were not very significant.

During the 2nd century, chastity, under the influence of Christianity, has again become a virtue, and between the spouses, the conjugal love was considered a standard for choosing the life partner. The virtue has replaced the social status, love has taken over the place of submission, and decency has substituted the moral decadence. In the name of a new ideal, the old Roman virtues, which had been compromised or lost, shall be rehabilitated: the dignity of the person, family cohesion, civic bravery. It is clear that the religious ideas had a distinguished role in it, however no religion has gone so far in forbidding divorce, as Christianity did. Beginning with Constantine the Great and up to Justinian, the Christian dogmas have gained ground in influencing the Roman family law, but also that of succession. The *Corpus* of Justinian stands as a proof. Entrusting most of the legal work to a pagan, Tribonian, but at the same time being guided by Biblical principles, Justinian succeeded to give the law science a very rational and, at the same time, humanist feature. Thus we are talking about an internal relationship leading us to the conclusion that Justinian's laws represent a

cause of his religious beliefs. In terms of legal relations existing within the family, the agnatic institution of the *pater familias* has disappeared, its place being taken by the cognate relationships; as a direct consequence, the noxal surrender of the descendants was forbidden. Moreover, in harmony with the Christian principles, the emperor has facilitated the possibility of manumission of slaves and has declared the freedmen as equal before the law as those who were born free men. On the whole, Justinian's laws prove that he has decided to improve the women's condition and their rights within the marriage. Furthermore, even if he hindered the conditions in which two Roman citizens, husband and wife, were entitled to divorce, in terms of sanctions, he made the man and the woman equal. Otherwise said, the Roman law of Justinian has become a *ius gentium*, with general applicability, both in terms of subjects and in terms of territory.

Having great importance as evidence in case of divorce and at the same time being part of the succession patrimony remaining behind the deceased *pater familias*, the importance granted to dowry and wedding gifts varied in Rome, depending on the historical period, and on the economic and social status of the spouses. This donation can be defined as a contract by which the woman or another person on her behalf, gives or promises something, in order to support family expenses. Dowry, as a strictly patrimonial instrument, *Zestrea*, ca instrument strict patrimonial, becomes perceptible especially as the individualism develops, the *sine manu* marriages increased and the women's independence increased, thus in the 2nd century B.C. being a natural practice among the Roman citizens - *dos necessari*. We notice how, as the number of divorces increases, the Roman jurists were facing the situation of having to find more and more answers and solutions regarding what happens to the dowry patrimony. Being aware of the fact that they were forced by the circumstances to translate the complexity of conjugal unions into legal terms, the institution of the dowry makes us, once again, notice the subtlety of the analysis made by these virtuosos in the field of *ars boni et aequi*. The legal rules initially implemented by the Romans belonged to a patriarchal society, where the role of the woman was only to grow children and spin wool. At the same time, we consider that the excessive emancipation of women, following the Punic Wars, was also a response matching the masculine restrictions weighing on the Roman woman, for almost half a millennium. Therefore, we believe that the legal measures adopted in terms of dowry status attempted to make women gain a natural place in the society of the Eternal City. Even if they seem excessively profitable for the woman, these chapters of laws have weighed, very well, the condition of the widow wife or a woman that divorced because of the man's fault. Strongly connected to the chapter of successions, the

granted dowry rarely reaches the *sui iuris* surviving wife married *sine manu*, as beneficiary. Thus, only in this context, the Roman jurists have created the pro-feminine rules that apply to dowry, which have been presented within our research.

As a branch of the Roman Law, successions represent the most complex and debated of all. If the Law of the 12 tables clearly explains how, when and to whom the property of a deceased person is transferred, the Pandects, and respectively Justinian's Institutions, reserve a quarter, and respectively one third to this legal domain. The rapid development of the Roman succession law is based not only on the changes occurred at social and economic level, but also on the constant interest of jurists so that *successio ab intestato* keeps the pace with these changes. When the austerity of the morals ensures a prestige that the marriage never will have again, it seems normal to see the wife as the husband's daughter, inheriting him together with the descendants. Later on, when the inflow of richness and foreigners in Rome have accelerated the life rhythm, the personal and patrimonial independence of spouses, from one another, was vividly felt. Thus, in the *sine manu* marriage, the surviving wife is removed from the legal inheritance. As Christianity emerged, changes occurred in favor of the wife, in this field as well, bringing to the foreground the affection on which the marriage of the two spouses was based of. The succession system of *ius civile*, simultaneously with *bonorum possessio*, have resisted during the entire classical era, being officially abolished only by Justinian. After Justinian granted the wife married without dowry and repudiated without a grounded reason, one quarter of husband's possessions, through the Novel 22 of the year 535, in the following years, the emperor shall also intervene in the field of succession, providing a helping hand to the destitute surviving husband. In Novel 53, the right of inheritance is acknowledged for the wife who had not had any dowry, who had not received any *propter nuptias* donation and who lived in *extrema necessitate* following the death of her husband. The same idea is found in Novel 177, where the woman is required to prove the fact that she is an *inopem mulierem*. Acknowledging the beneficial influence of the Christian religion in terms of successions, we conclude that in this field, in the old Roman law the women benefitted from an even better condition than the one created by Christianity.

It is difficult to define the Roman woman as "emancipated", because the presentations related to her have varied depending on the personal experience and expectations of the authors who have described her. While we have some certainty regarding legal provisions in terms of divorce, we do not know exactly what the situation was, *de facto*, in the Roman world. How many women have

succeeded to end a failed marriage by divorce? How many cases were there of men who consented to the divorce demanded by their wife? Actually, any investigation in the Romans' life implies individual interpretation and many speculations. Moreover, considering the fact that all the legal and historical sources have been written by men, we shall never have any certainty regarding the position of women in terms of legal issues, as well as the personal area, such as divorce.

By what we have presented, we intended to provide a view on the society, the main role being played by the metamorphoses that the Roman women went through, following a precise journey, from their birth, as daughters, then wives, mothers and in the end widows. If, in the times of harsh discipline, women represent the most perseverant of the conservative forces of a nation, in times of anarchy and confusion, she is the most active dissolving force, due to the luxury, immorality and here willing sterility. Christianity, and with it, the laws of Justinian, have compared the woman to the Church; by this symbol women are seen as a resource that must be protected and maintained pure, in order to provide the man with heirs, but also honor.